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Ambulation, Severance, and the Common Intention Constructive Trust

In *Jones v Kernott* [2011] UKSC 53; [2011] 3 W.L.R. 1121, an unmarried couple initially held the beneficial ownership in a house as joint tenants but, according to the Supreme Court, were ultimately entitled as beneficial tenants in common in the proportions of nine to one under a common intention constructive trust (see Gardner and Davidson "The Supreme Court on family homes" (2012) 128 L.Q.R. 178). In his remarks on the case in "Co-ownership and an equitable non sequitur" (2012) 128 L.Q.R. 183, Professor Adrian Briggs raises an interesting issue. He suggests (at 183) that if the initial presumption of a joint tenancy in equity has not been rebutted "from the word go", then "a tenancy in common, regardless of the size of the intended shares within it, must be born of a severance of that joint tenancy". Yet, he points out, "the term 'severance' is not found anywhere in [the Supreme Court] judgments". He concludes (ibid) that:

> "The result seems to be that an equitable tenancy in common results from beneficial joint tenants just drifting apart. Neither the Law of Property Act 1925 s.36(2), nor *Williams v Hensman* (1861) 1 John. & H. 546, really prepared us for that."

Dr Martin Dixon has also drawn attention to the question of severance, describing it as a "lingering and unremarked issue in both *Stack* [*v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432] and *Kernott*": "The still not ended, never-ending story" [2012] Conv. 83 at 84.

In fact, if one focuses on the issue of severance in this context, a further question seems to arise. Even if it could be said that the parties' initial beneficial joint tenancy had subsequently been severed in accordance with the orthodox rules on the point, the parties would have been left with a tenancy in common in equal shares. It would remain to be explained how the shares under this equitable tenancy in common could have changed from 50:50 to 90:10 in favour of the claimant. What of s.53(1)(c) of the Law of Property Act 1925, which requires that any disposition of a subsisting equitable interest or trust must be in

writing (a point raised by Walton J. in *Richards v Dove* [1974] 1 All E.R. 888 at 894)?

This note suggests that the explanation, both in respect of severance and the alteration in the extent of the parties' shares, lies in an understanding of the "ambulatory" potential of the common intention constructive trust. This term derives its currency from a remark by Lord Hoffmann in the course of argument in *Stack v Dowden*, unfortunately unreported but referred to in two other speeches in the case. The word's Latinate "elegance" (*per* Lord Neuberger in *Stack* at [138]) comes at a cost in terms of precision. Baroness Hale indicated (at [62]) that an ambulatory constructive trust was possible because "the parties' intentions may change over the course of time". However, it is clear that ambulation can occur even where there is no change in the parties' actual (express or inferred) common intention and a change only in the fictional common intention that the court will, in certain instances, impute to the parties in relation to the question of quantum.

As an example of the latter possibility, consider a case like *Stack* itself where, at the time of acquisition, there was a common intention that the beneficial interests would differ from the legal title but no common intention as to quantum. In such a scenario, according to *Jones* (at [51] *per* Lord Walker and Lady Hale, quoting Chadwick L.J. in *Oxley v Hiscock* [2004] EWCA Civ 546; [2005] Fam. 211 at [69]), the parties will each be "entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property". This result is explained in *Jones*, in an essentially redundant analytical step, on the basis that a corresponding fictional common intention as to quantum is imputed to the parties. As the course of the parties' dealing with the property plays out, their beneficial entitlements are liable to vary over the years (in line with a similarly fluctuating imputed common intention as to quantum). The nature of the variation will depend on the actions taken by the parties and it is easy to envisage the shares remaining constant over an extended period. Equally, however, one can identify possible major points of departure, such as where one party makes a substantial capital payment towards the mortgage or pays for an extension. Therefore, if a graph were to be drawn tracing the beneficial share of the claimant over the relevant time period, it

might show a number of jumps upwards or downwards, with each jump reflecting a significant event in the parties' course of dealing with the property. Alternatively, if one party had been steadily contributing to a mortgage in a manner tending to increase that person's share, there might be a large number of smaller increases rather than a small number of more major shifts.

The extent of the parties' beneficial ownership at points in the past is not a purely theoretical issue. Despite Lord Scott's remarks in *Thorner v Major* [2009] UKHL 18 at [20] (discussed by Mee "The Limits of Proprietary Estoppel" (2009) 21 C.F.L.Q. 367 at 378-381), the common intention trust is not a "remedial" constructive trust that comes into existence only from the time a court has declared its existence. If the rights of a third party such as a mortgagee come into play, it may be necessary to determine the position at the time at which the issue of priority arose. However, in a case where the issue relates simply to the entitlements of the parties at the date of the trial, it would obviously not make sense for the court to try to draw the type of hypothetical graph mentioned earlier. The court will simply (when dealing with a common intention that does not extend to the issue of quantum) assess what shares are fair now in light of the parties' full course of dealing with the property. The court will not try to reconcile its conclusion as to the current state of the beneficial entitlements with the one that it would have arrived in respect of the position two or ten or twenty years ago.

The point is that, at a theoretical level, each new division of the beneficial ownership results from a fresh application of the common intention constructive trust doctrine. Section 53(1)(c) of the Law of Property Act 1925 is not applicable because each new division of the beneficial ownership occurs under a new, or (to put it a different way) newly refreshed, constructive trust: note the exemption in respect of "the creation or operation" of non-express trusts in s.53(2) of the 1925 Act. The change is not the result of a conventional disposition of an equitable interest, or (if the change is away from a beneficial joint tenancy) a conventional act of severance, by a beneficiary under the trust that formerly existed.

Ambulation may also be triggered by a change in the parties' actual (express or inferred) common intention. There are a few variations on this theme. It could be for instance that, at the time of the acquisition of the property,

the parties had a common intention that the claimant would have a defined share but, some time later, they changed their common intention, so that the claimant was to have a specified greater share. This would lead to a "single-jump" ambulation (assuming that the other requirements of the doctrine are satisfied). Alternatively, there could be a "multi-hop" ambulation if the new common intention did not extend to the issue of quantum and the "fair shares in light of the parties' course of dealing" test began to govern the extent of the parties' shares from that point onwards.

A version of these scenarios arises in joint names cases where, as in *Jones*, there was initially no common intention that the beneficial interests would differ from the legal title but the court identifies a subsequent change in the parties' common intention. At the time of acquisition in this scenario, there is no reason to depart from the starting point whereby the parties hold the property as beneficial joint tenants. The logic of the statutory co-ownership scheme requires that a trust should arise in this situation even though the Law of Property Act 1925 does not explicitly provide for it (see McFarlane *The Structure of Property Law* (2008) pp.712-713). According to Lord Walker and Baroness Hale in *Jones* at [15], the trust that arises at this point, although mirroring the parties' legal ownership, "can be classified as a constructive trust" (although, arguably, it would better be seen as an implied statutory trust). A "single-jump" ambulation would occur where this initial beneficial joint tenancy is displaced on the basis of a subsequently formed common intention in favour of another specific division of the beneficial interests, or there could be a "multi-hop" ambulation if the subsequent common intention did not extend to quantum. Although the courts may resist this conclusion, it seems logical that, notwithstanding *Goodman v Gallant* [1986] Fam. 106, similar results would follow even if the initial beneficial joint tenancy was supported by an express declaration of the beneficial interests: compare *Clarke v Meadus* [2010] EWHC 3117 (Ch).

On closer inspection, *Jones* itself does not appear to have involved a "single-jump" change in the beneficial interests but rather a "multi-hop" ambulation. This is because the subsequent common intention attributed to the parties by the Supreme Court (as of late 1995, two years after their separation and after an attempt to sell the disputed house had failed) was that the

defendant's interest in the disputed property would "crystallise" at that point. The result was said (at [48] *per* Lord Walker and Lady Hale) to be that the claimant "would have the sole benefit of any capital gain" in the disputed property, while the defendant would enjoy the capital gain associated with another property that he purchased shortly afterwards in his sole name. An event that "crystallised" the defendant's share might be expected to mark the end, rather than the start, of a process of change. However, what was envisaged as having crystallised was the financial value of the defendant's share rather than the percentage of the total beneficial ownership that it represented. In order for the financial value of the defendant's share to remain constant as the equity in the property increased in value, his percentage share necessarily had to vary downwards with each increase in the value of the equity. Thus, immediately prior to the formation of the common intention in late 1995, he had a potential 50% interest but, by the date of the trial in 2008, he was held to have a share of 10%. While Wall LJ in the Court of Appeal had stated ([2010] EWCA Civ 578; [2010] 1 W.L.R. 2401 at [57]) that "[p]resumably, if the beneficial interests are 'ambulatory' and the ambulation continues in the same direction, the defendant's interest in the property will at some point be extinguished", this does not reflect the situation found to exist by the Supreme Court. The financial value of the defendant's share did not change at all over the years and, in mathematical terms, his percentage share in the beneficial ownership would only have diminished to a limit of zero if the value of the property had reached infinity (which would have required an even bigger property bubble than that experienced in recent years).

Although it has been argued above that the phenomenon of ambulation is sufficient to explain the absence of concern about the issue of severance in *Jones*, there is still a great deal wrong in doctrinal terms with the common intention constructive trust. The aim here has been to understand, rather than to celebrate, its vigour in the ambulation stakes.